(8)

No. 02-8286

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In the Supreme Court of the United States

DELMA BANKS, JR.,

Petitioner,

v.

JANIE COCKRELL, DIRECTOR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF JOHN J. GIBBONS, TIMOTHY K. LEWIS, WILLIAM S. SESSIONS, HAROLD R. TYLER, JR., HAROLD G. CLARKE, AND JAMES G. EXUM, AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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John J. Gibbons, Timothy K. Lewis, William S. Sessions, Harold R. Tyler, Jr., Harold G. Clarke, and James G. Exum, submit this *amicus curiae* brief in support of the petitioner, Delma Banks Jr.[1/]

1/ This brief was not written in whole or in part by counsel for a party, and no person or entity other than the *amici curiae* and their counsel has made any monetary contribution to the brief's preparation or submission. The parties have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

Amici curiae are former federal and state judges who maintain an active interest in the fair and effective functioning of the criminal justice system.[2/] *Amici* are committed to ensuring that the death penalty is fairly administered and is not procured through prosecutorial misconduct and violations of constitutional guarantees.

The fairness of the capital sentencing process is dependent on the proper fulfillment of the roles of prosecutor

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2/ John J. Gibbons served as a judge of the United States Court of Appeals for the Third Circuit from 1970 to 1987, and as Chief Judge of that court from 1987 to 1990. Timothy K. Lewis served as a judge of the United States Court of Appeals for the Third Circuit from 1992 to 1999, and as a judge of the United States District Court for the Western District of Pennsylvania from 1991 to 1992. William S. Sessions served as a judge for the United States District Court for the Western District of Texas from 1974 to 1980, and as Chief Judge of that court from 1980 to 1987. He also served as Director of the Federal Bureau of Investigation from 1987 to 1993, and as U.S. Attorney for the Western District of Texas from 1971 to 1974. Harold R. Tyler, Jr. served as a judge for the United States District Court for the Southern District of New York from 1962 to 1975. He was also an Assistant U.S. Attorney for the Southern District of New York from 1953 to 1955, the Assistant U.S. Attorney General, Civil Rights Division, from 1960 to 1961, and the Deputy Attorney General of the United States from 1975 to 1977. Harold G. Clarke served as a justice of the Supreme Court of Georgia from 1979 to 1990, and as Chief Justice of that court from 1990 to 1994. He also served in the Georgia Legislature from 1961 to 1971. James G. Exum served as a justice on the Supreme Court of North Carolina from 1975 to 1986, and was Chief Justice of that court from 1986 to 1994.

and defense counsel. The questions presented in this case concern prosecutorial suppression of evidence and ineffective assistance of counsel – issues that, by their very nature, threaten the ability of the adversarial system to produce just results. The prosecutorial duty to disclose material exculpatory evidence reflects the notion that prosecutors represent the public, which "wins not only when the guilty are convicted but when criminal trials are fair." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). When evidence is wrongfully suppressed, the prosecutor violates his duty to the public and also interferes with defense counsel's ability to serve as an effective advocate. The resulting "gladiatorial" contest, "unmitigated by any prosecutorial obligation for the sake of truth," fails to satisfy the basic demands of justice. *Kyles v. Whitley*, 514 U.S. 419, 439 (1995).

Similarly, the paramount importance of adequate defense counsel in capital cases cannot be overstated. When a criminal defendant is forced to pay with his life for his lawyer's errors, the effectiveness of the criminal justice system as a whole is undermined. As this Court stated in *Strickland v. Washington*, 466 U.S. 668, 685 (1984):

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

The questions presented by this case are therefore of vital importance to all persons who are committed to ensuring fairness and accuracy in the administration of the death penalty.

SUMMARY OF ARGUMENT

The questions presented in this case directly implicate the integrity of the administration of the death penalty in this country. The prosecutors concealed important impeachment material from the defense. In addition, the district court found, and the court of appeals agreed, that Mr. Banks received ineffective assistance from his lawyer, at least at the penalty phase of his trial. The court of appeals' reasons for reversing the district court's grant of relief, and refusing to issue a certificate of appealability as to grounds rejected by the district court, are inconsistent with prior decisions of this Court.

Moreover, the court of appeals' treatment of these claims poses a significant threat to the fairness of future proceedings. By penalizing petitioner for failing to discover sooner that the prosecution wrongfully withheld evidence, the court effectively insulated the prosecutors' conduct from judicial review and provided an incentive for prosecutors to withhold evidence in the future. Similarly, by requiring petitioner to demonstrate that *each individual piece* of mitigation evidence that was not presented at trial as a result of his lawyer's substandard performance would have yielded a different result at the penalty phase, the court of appeals established an unreasonable standard by which to evaluate ineffective-assistance claims.

Because the constitutional violations at issue in this case undermine the reliability of Mr. Banks's conviction and death sentence, the decision of the court of appeals should be reversed.

ARGUMENT

I. THE CAPITAL PUNISHMENT SYSTEM CANNOT FUNCTION FAIRLY AND EFFECTIVELY UNLESS PROSECUTORS AND DEFENSE COUNSEL PROPERLY PERFORM THEIR ROLES

Two of the most predominant flaws in the death penalty system as currently administered are the persistent failure of prosecutors to disclose exculpatory evidence to the defendant – despite a clear constitutional command that they do so – and the often abysmal representation provided to capital defendants at trial. A study evaluating error rates in capital cases from 1973 to 1995 concluded:

> The most common errors – prompting a majority of reversals at the state post-conviction stage – are (1) egregiously incompetent defense lawyers who didn't even look for – *and demonstrably missed* – important evidence that the defendant was innocent or did not deserve to die; and (2) police or prosecutors who *did* discover that kind of evidence but suppressed it, again keeping it from the jury.[3/]

Similarly, the report prepared by a "blue ribbon committee" of lawyers, judges, and public officials, established to address "the deeply disturbing risk that Americans are being wrongfully convicted of capital crimes or wrongfully sentenced to death," concluded that the "lack of adequate counsel to represent capital defendants" and the failure of prosecutors to provide the defense with exculpatory evidence are among the most persistent flaws in the death penalty

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3/ James Liebman, *et al.*, *A Broken System: Error Rates in Capital Cases, 1973-1995*, at ii (June 12, 2000) (available at http://justice.policy.net/jpreport); *see id.* at 6.

system. *Mandatory Justice: Eighteen Reforms to the Death Penalty*, at ix, 1, 50 (The Constitution Project, 2001).[4/]

Both of these flaws are implicated by this case. Mr. Banks's trial was marred by the apparently deliberate suppression of evidence by the prosecution and the "dismal performance" of Mr. Banks's counsel. These claims go to the very heart of the effective functioning of the capital punishment system. Yet one of these claims – involving the suppression of a pre-trial statement of the State's principal guilt-phase witness – has never been heard by any court. The others were rejected by the court of appeals even though the district court concluded that they substantially undermined the reliability of the jury's decision to impose the death sentence.

The courts are responsible to capital defendants and to the public to identify and correct constitutional errors in capital cases. As the Delaware Supreme Court recently observed, "[w]hile the adoption of the death penalty . . . is a legislative prerogative, the judiciary has a special obligation to ensure that the standards governing its application are applied fairly and dispassionately and, just as important, appear to be so." *Stevenson v. State*, 782 A.2d 249, 260 (Del. 2001). In this case, the court of appeals' decision would allow Mr. Banks's execution to go forward despite

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4/ The Constitution Project, which is based at Georgetown University, "seeks to develop bipartisan solutions to contemporary constitutional and governance issues by combining high-level scholarship and public education." *Id.* at ix. The project's death penalty initiative was established in May 2000 "to examine our country's present course, and to recommend ways to ensure that fundamental fairness is guaranteed for all." *Id.* Two of the *amici* – John J. Gibbons and William S. Sessions – are members of the Constitution Project death penalty initiative.

uncured constitutional errors in the process through which he was convicted and sentenced. Relief should be granted in order to resolve lingering doubts regarding whether these errors were responsible for the outcome of Mr. Banks's trial.

II. DISCLOSURE OF EXCULPATORY OR IMPEACHMENT EVIDENCE IS ESSENTIAL TO ENSURE FUNDAMENTAL FAIRNESS IN CAPITAL CASES

Under clearly established federal law, a state violates a defendant's right to due process when it fails to disclose evidence favorable to the accused prior to trial and the evidence is "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Indeed, a defendant's right to receive from prosecutors exculpatory impeachment material is "a right that the Constitution provides as a part of its basic 'fair trial' guarantee." *United States v. Ruiz*, 536 U.S. 622, 628 (2002).

In addition, this Court has long recognized that a prosecutor's "deliberate deception of court and jury by the presentation of testimony known to be perjured" is "inconsistent with the rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). As a result, due process is violated when a prosecutor fails to correct testimony that he knows to be false, even when the falsehood goes only to the witness's credibility. *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (per curiam); *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

These principles illustrate "the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). In our system, the prosecutor's role "transcends that of an adversary: [the prosecutor] 'is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *United*

States v. Bagley, 473 U.S. 667, 675 (1985) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

In this case, the District Attorney's office assured Mr. Banks that there would be no need to litigate discovery disputes. In a letter to Mr. Banks's counsel, the prosecution wrote "[w]e will, without necessity of motions provide you with all discovery to which you are entitled." 1 SR 13.[5/] Despite this representation, the prosecution withheld evidence that would have allowed Mr. Banks to discredit two of the State's most important trial witnesses. The court of appeals wrongly held that Mr. Banks failed to object at the appropriate time to the State's suppression of this evidence and did not realistically consider the impact that the evidence would have had on the jury had it been introduced.

A. The Failure of Mr. Banks's Habeas Petition Specifically to Mention the Suppressed Transcript as One of the Bases for His Stated *Brady* Claim Should Not Preclude Judicial Review of that Claim.

It is undisputed that the State failed to produce in discovery a lengthy transcript of a pre-trial interview of Charles Cook by Bowie County law enforcement officers and prosecutors. The suppressed transcript substantially undermines the reliability of the State's principal guilt-phase witness.[6/]

5/ "SR" refers to the state trial record, preceded by a volume number and followed by a page number. "R" refers to the federal habeas record, preceded by a volume number and followed by a page number. "Fed. Tr." refers to the transcript of the federal evidentiary hearing. "Fed. Ex." refers to the exhibits introduced at the federal evidentiary hearing.

6/ *See generally* Fed. Ex. B-04 (included in Exhibit A to petitioner's Motion to Compel Discovery, dated May 11, 1999, and reprinted in volume 3 of the federal habeas record).

In particular, Mr. Cook testified at trial that he had spoken to no one in preparation for his testimony. 9 SR 2314. The transcript demonstrates that this statement was false, and that Mr. Cook's trial testimony was extensively rehearsed.[7/] Nonetheless, the prosecutors – who were in possession of the transcript at trial – assured the jury that Mr. Cook testified truthfully. 10 SR 2449-50.

In addition, Cook's statements in the transcript differ in several respects from those made in the April 1980 statement he gave to the police, which was produced to the defense. For instance, Cook did not consistently describe the circumstances surrounding Cook's alleged disposal of Banks's gun and the victim's car and other possessions.[8/]

7/ For example, in the September interview, Cook was coached on how to deal at trial with an illogical portion of the statement that he gave to the police in April, in which he said that he noticed blood on Mr. Banks's pants *after* Banks had changed clothes. In the transcript, Assistant District Attorney McDaniel told Cook:

> Your statement is obviously screwed up. And they are going to ask you about it and they are going to rake you over the coals about it because it is screwed up. It doesn't make any sense that he changed clothes and you got back in the car and went riding and then you noticed blood on his pants because if he changed clothes he wouldn't have any blood on his pants. . . . They are going to ask you about it and you are just going to have to explain it. That you [made] a mistake and you got your facts out of sequence.

Fed. Ex. B-04 at 24.

8/ In the April 1980 statement that Cook gave to the police, for example, Cook stated that he abandoned the car

Moreover, the transcript reveals that the police supplied Cook with crucial information regarding the crime, such as the date it occurred and that the victim was "a white boy," before Cook gave his April statement. *See* Fed. Ex. at 19-20.

Mr. Banks presented a *Brady* claim in his federal habeas corpus petition, but obviously was unable to include a specific mention of the Cook transcript because the State had not yet disclosed its existence at the time the petition was filed. Indeed, the State did not produce the transcript until the magistrate judge directly ordered the State to produce documents concerning Charles Cook, including "records of contact . . . , preparation notes, interview notes, and all other written or recorded documentation." 2 R 621. By this time, three years had passed since Mr. Banks filed his habeas petition and nearly *nineteen* years had passed since Mr. Banks's trial. The transcript was introduced at the evidentiary hearing, and Assistant District Attorney Elliot (who was one of the prosecutors at Mr. Banks's trial) confirmed that the prosecution had the transcript before the trial, but did not disclose it to Mr. Banks. Pet. App. A at 10.

The court of appeals rejected Mr. Banks's *Brady* claim regarding the Cook transcript on the ground that Mr. Banks did not mention the transcript in his federal petition,

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on "Canna Drive" and left the keys under the seat. *See Affidavit of Charles E. Cook* at 2 (dated April 24, 1980) (included in Exhibit A to petitioner's Motion to Compel Discovery, dated May 11, 1999, and reprinted in volume 3 of the federal habeas record). In the September transcript, however, Cook said that he left the car on "Town Drive" with the keys in the ignition. Fed. Ex. B-04 at 12-13. At trial, Cook testified that he left the car on "Canada Drive," but did not mention what he did with the keys. 9 SR at 2303. In addition, the transcript itself is internally inconsistent regarding when Cook supposedly disposed of these items. *See* Fed. Ex. B-04 at 13-14.

and did not move to amend his petition under Federal Rule of Civil Procedure 15 once the State disclosed the transcript in 1999. *See* Pet. App. A at 52. Rule 15(b) provides, however, that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." As a result, and as the court of appeals recognized, "once issues are presented and argued without objection by opposing counsel, such issues are tried by implied consent of the parties and are treated as if they had been raised in the pleadings." Pet. App. A at 51 (quoting *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384, 389 (5th Cir. 1984)).

Here, the magistrate judge informed the State in advance that impeachment evidence regarding Cook would be addressed at the evidentiary hearing, and the Cook transcript was admitted into evidence without objection from the State. *See* 3 R 630; Fed. Tr. 64-76; Pet. App. C at 5. Mr. Banks extensively addressed his claim that the suppression of the Cook transcript violated *Brady* in the Proposed Findings of Fact and Conclusions of Law that he submitted before the magistrate judge issued her report and recommendation.[9/] Nevertheless, the court of appeals ruled that the lack of an amendment to the habeas petition precluded consideration of this aspect of the *Brady* claim, stating that "Banks has not pointed to any authority supporting his contention that, for Rule 15 purposes, an evidentiary hearing equates with a trial." Pet. App. A at 52.

Contrary to the court of appeals' ruling, Rule 15(b) should not be interpreted to apply only when a proceeding

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9/ 4 R at 921, 930-31, 953-671; *see* 5 R 1265. The court of appeals was therefore incorrect in suggesting that the issue was "first raised in [Mr. Banks's] objections to [the magistrate judge's] report and recommendation." Pet. App. A at 52.

labeled "trial" has occurred. Rather, the rule is appropriately applied whenever issues have been presented to the court for adjudication, regardless of whether they are presented during the course of a trial or some other evidentiary hearing or proceeding. That is particularly so, where, as here, there not only was no objection from the State at the evidentiary hearing but the circumstances reveal that there was absolutely no possibility of any surprise or unfairness to the State. The State was fully aware of the Cook transcript and had had the document in its possession for many years. In these circumstances, the purposes of Rule 15 were fully served by permitting Mr. Banks to rely on the Cook transcript at the federal evidentiary hearing.

As the petitioner notes, this Court already has suggested strongly that Rule 15(b) may be applied when issues are tried in evidentiary hearings in habeas corpus cases. *See, e.g., Withrow v. Williams*, 507 U.S. 680, 696 (1993). Indeed, the Fifth Circuit itself has operated under that assumption in several cases. *See, e.g., James v. Whitley*, 926 F.2d 1433, 1435 n.3 (5th Cir. 1991), *cert. denied sub nom. James v. Cain*, 516 U.S. 918 (1995); *Streeter v. Hopper*, 618 F.2d 1178, 1180 (5th Cir. 1980); *Mosley v. Dutton*, 367 F.2d 913, 916 (5th Cir. 1966), *cert. denied*, 387 U.S. 942 (1967).

In fact, several federal courts (including the Fifth Circuit itself in a non-habeas case) have gone even further, relying on Rule 15(b) in reaching claims that were not included in the pleadings but that had been litigated by the parties in, for example, motions for summary judgment or preliminary injunction hearings. *See, e.g., Hernandez-Loring v. Universidad Metropolitana*, 233 F.3d 49, 51 n.1 (1st Cir. 2000) (treating complaint as effectively amended under Rule 15(b) to include separate sexual harassment claim because both parties briefed the issue in their summary judgment memoranda); *Clomon v. Jackson*, 988 F.2d 1314, 1323 (2d Cir. 1993) (affirming denial of motion for judgment on the pleadings where, although pleadings were

"scant," "the undisputed facts as presented on the summary judgment motion served as a basis to deem the complaint amended to conform with the proof" under Rule 15(b)); *Apple Barrel Productions*, 730 F.2d at 388-89 (holding that claim for misappropriation of intellectual property, although not included in pleadings, was properly before the district court where plaintiff introduced testimony and submitted arguments regarding that claim at preliminary injunction hearing without objection from defendant).[10/]

The court of appeals' rigid adherence to its cramped construction of Rule 15 also constitutes a departure from the equitable principles that appropriately govern the exercise of the federal courts' habeas power. This Court has long recognized that the writ of habeas corpus should be "administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969); *see also Brecht v. Abrahamson*, 507 U.S. 619, 652 (1993) (O'Connor, J., dissenting) ("If there is a unifying theme to this Court's habeas jurisprudence, it is that the

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10/ Some federal courts have declined to apply Rule 15(b) simply on the basis of matters raised in the context of a summary judgment motion. *See, e.g., Crawford v. Gould*, 56 F.3d 1162, 1168-69 (9th Cir. 1995); *see also Independent Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 596 (D.C. Cir. 2001) (citing conflicting D.C. Circuit cases and noting that "[i]t is an open question whether the Federal Rules permit parties to impliedly consent to 'try' issues not raised in their pleadings through summary judgment motions"). None of these cases, however, involves a situation where, as here, a matter was fully litigated by consent in the course of a federal evidentiary hearing and a reviewing court nevertheless held that the pleadings could not be deemed amended to include that claim solely on the basis that an evidentiary hearing is not a "trial."

ultimate equity on the prisoner's side – the possibility that an error may have caused the conviction of an actually innocent person – is sufficient by itself to permit plenary review of the prisoner's federal claim."); *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir.) (granting equitable tolling of applicable statutory limitations period in capital case "when the petitioner has been diligent in asserting his or her claims and rigid application of the statute would be unfair"), *cert. denied*, 534 U.S. 944 (2001). These principles counsel in favor of adjudication of Mr. Banks's full *Brady* claim (including the portion based on the Cook transcript). This is especially so where, as emphasized above, there has been no suggestion that the failure to amend affected in any way the State's presentation at the evidentiary hearing, and the State itself is solely responsible for the petitioner's ignorance of the transcript's existence at the time he filed his petition.

Although principles of federalism and comity appropriately restrain the federal courts from considering matters in habeas cases that could have been but were not presented in state court, the issue here is simply the construction and application of a federal rule of civil procedure; federalism and comity concerns are not implicated. Moreover, even if there were some reason to afford Texas courts the first opportunity to hear this claim, Texas has clearly signaled its lack of interest in doing so. After the petition for certiorari in this case was filed, Mr. Banks filed a petition for habeas corpus in state court challenging his conviction in part on the basis of the suppressed Cook transcript. His petition was summarily denied. *See Ex parte Banks*, No. 13,586-06 (Tex. Crim. App. Mar. 10, 2003) (per curiam) (unpublished order). As a result, there is no reason for the federal courts to abstain from hearing Mr. Banks's *Brady* claim regarding the suppressed Cook transcript. *Cf. Williams v. Taylor*, 529 U.S. 420, 444 (2000) (explaining that where state post-conviction relief was no longer available once the facts forming the basis of jury bias claim came to light, "though the state

courts did not have an opportunity to consider the new claims, petitioner cannot be said to have failed to develop them in state court by reason of having neglected to pursue remedies available under [state] law").

In this case, Mr. Banks's failure specifically to mention the prosecutors' suppression of the Cook transcript in his petition for habeas corpus is attributable solely to the State's concealment of its existence. The State should not be permitted to rely on its own wrongful conduct to avoid adjudication of a substantial constitutional question that may have been responsible for the jury's guilty verdict. There is no serious dispute that the transcript was suppressed and that Mr. Banks only learned of its existence after he had exhausted his state remedies. Accordingly, there appears to be no question that Mr. Banks has shown cause for not developing this claim in state court. *See Strickler v. Greene*, 527 U.S. 263, 283 (1999).

And, of course, neither the district court nor the court of appeals relied on any alleged state procedural default as a basis for failing to reach the merits of Mr. Banks's *Brady* claims regarding the Cook transcript. Rather, the courts below based their rulings entirely on the proceedings in federal court on Mr. Banks's habeas petition. Under these circumstances, this Court should, at the very least, vacate the judgment and remand to the district court with instructions to address whether Mr. Banks was prejudiced by the State's suppression of the transcript and, if so, to order a new trial. Given, however, that the critical importance of Cook's guilt-phase testimony is apparent on the face of the record now before the Court, and that the transcript's mere existence demonstrates that Cook lied on the stand when he said he had spoken to no one about his testimony prior to trial, the more appropriate course may be for this Court simply to conclude, based on its own review, that the prosecution's suppression of the transcript warrants a new trial.

B. The Petitioner Should Not Be Penalized for Failing to Discover Sooner that *Brady* Evidence Was Wrongfully Withheld.

The prosecution also suppressed the fact that one of the State's key witnesses – Robert Farr – was a police informant paid for his role in the investigation of this case. At trial, Mr. Farr denied that he was a paid informant, and the State did not correct this erroneous testimony. Pet. App. A at 5, 23 (quoting Pet. App. B at 4). Instead, the State assured the jury that his testimony was truthful. The prosecutors told the jury that Mr. Farr "ha[d] been open and honest with you in every way," and that his testimony was of the "utmost significance." Pet. App. C at 44; 10 SR 2579. After his trial and after Mr. Banks's state habeas petitions had been denied, Mr. Banks located Mr. Farr – who had since moved to California – and learned that, contrary to his trial testimony, Mr. Farr was in fact a paid informant in connection with Mr. Banks's case, and that his trial testimony on key points was inaccurate. *See* 3 R at 000693-94; Pet. App. C at 43.

In the federal habeas proceeding, Mr. Banks argued that the State violated *Brady* by failing to disclose Mr. Farr's paid-informant status prior to trial, and by failing to correct Mr. Farr's false trial testimony that he was not an informant. At his federal evidentiary hearing, Mr. Banks presented testimony from Bowie County Deputy Sheriff Huff, the lead investigator in the case, and two affidavits from Mr. Farr himself, confirming that Mr. Farr was paid to assist the police in obtaining evidence against Mr. Banks. Pet. App. A at 3, 9-10, 16. The district court adopted the magistrate's recommendation that relief be granted on this claim. Pet. App. B at 6.

The court of appeals reversed, holding that Mr. Banks had not shown cause for his failure to develop the factual basis for this claim in state court and that Mr. Farr's and Deputy Huff's testimony was not "exhausted." *Id.* at 19-20, 22-23. The court concluded that, because Mr. Banks suspected that Mr. Farr was a paid informant prior to the conclusion of his state habeas proceedings, he should have made more of an effort to uncover evidence of that fact. Pet. App. A at 19, 21-22. According to the court of appeals, the true "cause" of Mr. Banks's ignorance of Farr's status as a paid informant was Mr. Banks's own "lack of diligence." *Id.* at 22. As a result, the court concluded that the district court erred in conducting an evidentiary hearing on this claim and in receiving the evidence presented at that hearing. *See id.* at 20.

The court of appeals' decision inappropriately penalizes the defendant for failing to discover sooner that the State had wrongfully withheld, and continued wrongfully to withhold, evidence. Here, the responsibility for Banks's ignorance of Farr's paid-informant status rests solely with the State, which concealed that status for years. *See Strickler*, 527 U.S. at 283 (facts that documents were suppressed and trial counsel relied on prosecution's open-file policy were "fairly characterized as conduct attributable to the Commonwealth that impeded trial counsel's access to the factual basis for making a *Brady* claim"). This should be sufficient to establish the existence of cause for any procedural default that may have occurred at the state level. *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (a showing that interference by public officials impeded counsel's efforts to comply with state procedural rule constitutes cause); *Scott v. Mullin*, 303 F.3d 1222, 1229 (10th Cir. 2002) ("It is not a petitioner's responsibility to uncover suppressed evidence.").

Penalizing the defendant for failing to discover sooner that evidence was illegally suppressed is particularly inappropriate in this case, because the prosecutors assured the jury that Mr. Farr testified truthfully, even though they knew he had not. Moreover, the suppressed evidence – *i.e.*, the fact that a State witness was a paid informant – was uniquely within the control of the State. *See Mandatory Justice* at 50 ("While disclosure of all *Brady* information is

important, a special responsibility exists where," as in this case, "the prosecution creates such evidence through plea bargains and other inducements offered to accomplices or informants to secure their testimony."). Mr. Banks already had questioned the only other person who was privy to the relationship – Mr. Farr – and the State assured the jury that his denials were true. By placing the burden on Mr. Banks to discover that this testimony was false, the court of appeals effectively rewarded the prosecutors' dishonest and illegal conduct by insulating the conviction from meaningful review precisely because of their misconduct.[11/] *Cf. Smith v. Zant*, 301 S.E.2d 32, 37 (Ga. 1983) ("Since the prosecution has the constitutional duty to reveal at trial that false testimony has been given by its witness, it cannot, by failing in this duty, shift the burden to discover the misrepresentation after trial to the defense."). This ruling sets a dangerous precedent by providing the prosecution with an incentive to conceal *Brady* material for as long as possible.

C. The Court of Appeals' Materiality Analysis Was Seriously Flawed.

Under this Court's precedents, the standard normally applied for determining whether withheld *Brady* evidence is material is whether there is "a reasonable probability" that the defendant's conviction or sentence would have been different had the suppressed evidence been disclosed. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Thus, "[t]he question is not whether the defendant would more likely than not have received a

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11/ The court of appeals ultimately did address the merits of this *Brady* claim and held that the suppressed evidence was immaterial. *See* Pet. App. A at 32-33. As discussed below and more fully in petitioner's brief, the court of appeals' materiality review was significantly flawed.

different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." 514 U.S. at 434. Importantly, even under this standard, "[a] defendant need not demonstrate that after discounting the inculpatory evidence, there would not have been enough left to convict." *Id.* at 434-35; *accord id.* at 435 & n.8.

Not all *Brady* claims are the same, however. Some such claims may involve not only the suppression of exculpatory or impeachment information (here, Farr's status as a paid informant in this very case) but also the continuing suppression of that information even in the face of explicit sworn testimony to the contrary by State witnesses (here, Farr's own denial of his status as a paid informant). In these circumstances, where by its very nature the *Brady* claim also entails prosecutorial reliance on testimony known to be false, this Court's decisions strongly indicate that a different, less onerous materiality standard ought to apply. In *United States v. Agurs*, for example, the Court stated that, where the prosecution knowingly presents false testimony, relief should be granted "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S. 97, 103 (1976) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972), and *Napue*, 360 U.S. at 271).

The Court has not departed from this standard, even though it has revisited the subject on more than one occasion since *Agurs* was decided. In *Kyles*, for example, the Court explained that *Agurs* recognized "three situations in which a *Brady* claim might arise," including claims in which "previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured." 514 U.S. at 433. *Kyles* did not suggest any alteration of the *Agurs* standard for such claims, even though *Kyles* recognized that the Court's decision in *Bagley* "abandoned the distinction" between the other two kinds of *Brady* claims identified in *Agurs*, *i.e.*, claims in which the defense has made a general request for

exculpatory or impeachment material and claims in which the defense has requested specific items or categories of information asserted to be exculpatory. *See* 514 U.S. at 433-34 (citing *Bagley*, 473 U.S. at 682).

Here, the court of appeals reversed the district court's grant of relief because it concluded that Farr's paid informant status "does not present a reasonable probability that the jury would have found differently concerning future dangerousness." Pet. App. A at 33. There are two flaws with this ruling.

First, even assuming that the *Kyles* standard – not the more lenient *Agurs* standard – applies in this case, the court of appeals' denial of relief represents an unreasonable application of that standard. The court of appeals itself acknowledged that Farr's testimony that Mr. Banks intended to commit armed robberies and, if necessary, kill the victims, "was crucial to the State's position on future dangerousness." Pet. App. A at 32. Yet it concluded that the withheld evidence – *i.e.*, Farr's status as a paid informant – would not have contradicted that testimony directly, and that Farr's general credibility had been impeached in other ways, for example, by testimony indicating that he had been a paid informant in other cases in the past. Pet. App. A at 32-33. This analysis ignores the independent significance that the jury might attach to the witness's status as a paid informant *in this case*. The court of appeals' apparent supposition that all impeachment evidence is created equal is unfounded. *See Napue*, 360 U.S. at 269 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."). The court similarly defied logic in suggesting that the jury would have regarded Banks's willingness to obtain a gun for Farr as equally probative on the question of future dangerousness as Banks's own alleged intent to commit armed robberies. *See* Pet. App. A at 32.

Moreover, the impeachment value of Farr's paid-informant status was not simply that it revealed a potential inducement to lie on the stand. Rather, revelation of Farr's paid-informant status would have proved to the jury that he did in fact lie on the stand – at least about that aspect of his testimony. A reasonable jury might well have concluded that his testimony on other issues was unworthy of trust. Particularly where, as here, the district court has found that suppression of impeachment evidence regarding a key penalty phase witness "undermined the reliability of the jury's verdict regarding punishment," a court of appeals should be especially reluctant to usurp the jury's role by concluding that it would have reached the same result even if it had had the opportunity to hear the omitted evidence. *See* Pet App. C at 44.

Second, the court of appeals erred, in perhaps an even more fundamental way, in concluding that the *Agurs* standard – "any reasonable likelihood that the false testimony could have affected the judgment of the jury" – could not possibly apply in this case. The court reached that conclusion by distinguishing between *Brady* claims on the one hand, and claims in which the prosecution knowingly used false evidence on the other. *See* Pet. App. A at 29-32. That distinction, however, cannot be reconciled with either *Kyles* or *Agurs*, both of which expressly recognized that one species of *Brady* claim can arise precisely in those circumstances where the prosecution knowingly relies on perjured testimony. *See Kyles*, 514 U.S. at 433 (noting that *Agurs* referred to prosecutorial reliance on perjured testimony as one of "three situations in which **a *Brady* claim** might arise") (emphasis added). Thus, this Court does not view claims regarding suppression of impeachment evidence

and claims regarding presentation of false testimony to be mutually exclusive.[12/]

Moreover, even if Banks were required to plead his claim that the prosecution failed to correct Farr's false testimony separately from his claim that prosecutors wrongly suppressed Farr's paid-informant status, the court of appeals' conclusion that the former claim was "unexhausted" because it was not made in state court is erroneous for the reasons stated above – *i.e.*, that, by failing to correct Farr's perjury, and by suppressing his status as a paid informant, the State itself prevented Mr. Banks from developing the factual basis for such a claim in state court. *See* Pet. App. A at 32.

III. DEFENSE COUNSEL'S "DISMAL PERFORMANCE" AT THE PENALTY PHASE DEPRIVED MR. BANKS OF HIS CONSTITUTIONAL RIGHT TO PRESENT MITIGATING EVIDENCE THAT LIKELY WOULD HAVE PROMPTED THE JURY TO SPARE HIS LIFE.

The magistrate judge found that Mr. Banks received ineffective assistance of counsel at the penalty phase, and that counsel's deficient performance prejudiced the outcome of his trial. Pet. App. C at 24. The court of appeals' reversal of the grant of relief resulted from the court's failure to weigh all of the available mitigating evidence against all of the aggravating evidence as required by this Court's precedents.

12/ Notably, the court of appeals' ruling that such claims are "separate and distinct" was based on a pre-*Kyles* Fifth Circuit case, *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1991). *See* Pet. App. A at 29-30.

A. The Integrity of the Capital Sentencing Process Depends on Adequate Representation at Each Stage of the Proceedings.

Adequate legal representation is essential to the effective functioning of the adversarial system. "The lack of adequate counsel to represent capital defendants" has been described as "likely the gravest of the problems that render the death penalty, as currently administered, arbitrary, unfair, and fraught with serious error." *Mandatory Justice* at 1. As Yale law professor Stephen Bright observed:

> Arbitrary results, which are all too common in death penalty cases, frequently stem from inadequacy of counsel. The process of sorting out who is most deserving of society's ultimate punishment does not work when the most fundamental component of the adversary system, competent representation by counsel, is missing. Essential guarantees of the Bill of Rights may be disregarded because counsel failed to assert them, and juries may be deprived of critical facts needed to make reliable determinations of guilt or punishment. The result is a process that lacks fairness and integrity.

Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835, 1837 (1994).

Indeed, some commentators have concluded that the quality of counsel in capital cases is often outcome determinative. Citing Prof. Bright, the Constitution Project's *Mandatory Justice* report concluded that "the quality of defense counsel seems to be the most important factor in predicting who is sentenced to die – far more important than the nature of the crime or the character of the accused." *Mandatory Justice* at 1. Similarly, Justice Ginsburg recently reflected: "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay

applications in which the defendant was well represented at trial. . . . People who are well represented at trial do not get the death penalty." Anne Gearan, *Supreme Court Justice Supports Death Penalty Moratorium*, Associated Press, Apr. 10, 2001 (quoting Justice Ginsburg's remarks on April 9, 2001).

As both the district court and the court of appeals acknowledged, Mr. Banks did not receive adequate representation in his capital murder trial. His lawyer presented no evidence at the guilt phase of the trial and failed to launch any substantial attack on the State's weak, circumstantial case.[13/] Regarding the penalty phase, the magistrate judge found "an almost complete lack of preparation," as counsel "waited until the jury rendered its guilty verdict before instructing Bank[s]'s mother to gather witnesses for the punishment phase, which began the following day." Pet. App. C at 22. Mr. Banks's lawyer did not interview any of these witnesses before they testified, and did not conduct an investigation into the many mitigating factors and circumstances that would have shown that Mr. Banks did not present a danger to others in the future. Pet. App. C at 22. As the magistrate judge observed, "[n]either trial counsel nor the investigator attempted to obtain a social history from Banks or his family," "[n]either of Banks's parents was questioned about his childhood," and "[n]either of his parents was told they would be called as witnesses." *Id.* Based on this "dismal performance," the district court ordered relief from the death sentence. Pet. App. B at 5, 6; Pet. App. C at 54.

13/ Although the magistrate judge stopped short of finding that Mr. Banks's lawyer was ineffective at the guilt phase, she did note that Banks was prejudiced by counsel's "deficient performance, including aspects of his performance during the guilt phase of the trial." Pet. App. C. at 24.

The failures described by the magistrate judge clearly constitute ineffective assistance under this Court's precedents. Moreover, unlike many cases, there is no suggestion in this case that counsel's decision to forgo basic preparation for the penalty phase reflected some "tactical judgment not to present mitigating evidence at sentencing and to pursue some alternate strategy instead." *Wiggins v. Smith*, No. 02-311, slip op. at 8 (U.S. June 26, 2003) (citing *Strickland*, 466 U.S. at 690-91). Thus the only question here is whether Mr. Banks was prejudiced by his lawyer's failings. The court of appeals erroneously answered that question in the negative, and its decision should be reversed.

B. The Court of Appeals Erred in Failing to Weigh the Mitigating Evidence in the Aggregate.

As this Court has explained, "[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be lower" than that used to assess the impact of newly discovered evidence. *Strickland*, 466 U.S. at 694. As a result, a defendant need not demonstrate by a preponderance of the evidence that his counsel's errors determined the outcome of the proceeding. *Id.* Rather, he need only show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

The court of appeals' decision to reverse the district court's grant of relief was not based on a determination that Mr. Banks received adequate representation. On the contrary, the court agreed that "Banks has demonstrated deficient-performance." Pet. App. A at 36; *see id.* at 39, 41. Nor did the court of appeals find that Mr. Banks's lawyers would not have discovered evidence of mitigating factors had an appropriate investigation been conducted. Rather the court separately considered each piece of omitted evidence

that it believed was properly before it, and concluded that there was not a reasonable probability that any one piece of evidence – standing alone – would have altered the outcome of the proceeding.[14/] Pet. App. A at 39, 40, 41, 43-44.

In *Williams v. Taylor*, this Court held that the Virginia Supreme Court's determination that the petitioner was not prejudiced by his lawyer's inadequate performance was "unreasonable, insofar as it failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation." 529 U.S. 362, 397-98 (2000); *see also id.* at 397 (citing with approval the Virginia lower court's "assessment of the totality of the omitted evidence"); *cf. Kyles*, 514 U.S. at 436 (noting that materiality prong of *Brady* analysis should be considered in terms of "suppressed evidence considered collectively, not item by item"). This Court recently reaffirmed the principle that, in determining whether a defendant was prejudiced by his counsel's substandard performance, the court must "evaluate the totality of the evidence." *Wiggins*, slip op. at 24; *see id.* at 22 ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.").

In this case, the court of appeals never weighed all of the mitigating evidence that would have been presented had Mr. Banks received adequate representation. It thus never properly answered the question whether Mr. Banks was prejudiced by his lawyer's errors, as required by *Strickland v. Washington*, 466 U.S. 668 (1984). The court's flawed

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14/ The court held that some of the evidence should not have been considered in the federal habeas proceeding because it was "unexhausted." *See, e.g.*, Pet. App. A at 38, 42.

approach was particularly significant in light of the scant aggravating evidence produced by the State.

In contrast, the magistrate judge and the district court – which did properly address the question – concluded that there was a reasonable probability that the jury would not have sentenced Mr. Banks to die if it had been made aware of the facts that would have been brought to its attention by effective counsel. *See* Pet. App. C at 24-25. The available mitigation evidence in this case included evidence that Mr. Banks had a "troubled family life as a youth," that his "father abused alcohol and subjected Banks to repeated incidents of brutality and harsh discipline," that "[a]s a child Banks witnessed many episodes of cruelty directed at his mother," and that "Banks himself had no history of violence or alcohol abuse and seemed to possess a self-control that would suggest no particular risk of future violence." Pet. App. C at 23. As the court of appeals observed, evidence existed that Mr. Banks may have suffered brain damage, that he suffered from a chronic and disfiguring skin disease, and that "Banks was 'beaten and terrorized by his alcoholic father; at least one such incident involved young Delma's being tied to a tree and whipped'." Pet. App. A at 37 (quoting affidavit of Dr. Pina submitted to state court); *see id.* at 38.

In addition to failing to present this mitigating evidence concerning Mr. Banks's social history, Mr. Banks's lawyer failed to prepare effectively for his cross examination of one of the State's two penalty-phase witnesses. The magistrate judge found that, had trial counsel interviewed Vetrano Jefferson, who testified that Mr. Banks once struck him with a gun and threatened him, counsel would have learned that "Jefferson, not Banks, was the aggressor" in the fight, which occurred when Jefferson threatened his own

sister, who was Mr. Banks's pregnant common-law wife.[15/] Pet. App. C at 22-23. On the other hand, Mr. Banks had no prior convictions, and the principal testimony concerning future dangerousness was provided by a witness whom we now know was a paid informant for the State, and who lied at trial about his role in this case. As in *Wiggins*, "the mitigating evidence in this case is stronger, and the State's evidence in support of the death penalty far weaker, than in *Williams*, where [the Court] found prejudice as the result of counsel's failure to investigate and present mitigating evidence." *Wiggins*, slip op. at 25.

As the Court made clear in *Williams v. Taylor*, Mr. Banks had a constitutionally protected right to provide the jury with the mitigating evidence that his trial counsel failed to discover or present. 529 U.S. at 393. The Court should reverse the decision of the court of appeals, to make clear that this right cannot be overlooked on the basis of an item-by-item evidentiary review but must be evaluated instead through a fair comparison of what the jury actually heard with the totality of what it would have heard had counsel performed in a competent manner. Reversal in this case is essential to avoid the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). As this Court has stated, "[w]hen the choice is between life and death, that risk is unacceptable and

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15/ Mr. Jefferson testified at the federal evidentiary hearing: "I was drunk and one day I came over and I was threatening my sister and he defended her. And when he told me to leave her alone, I told him I'll whoop his ass. So we got into a fight. And he got a gun and hit me in the face with it." Fed. Tr. at 166. When asked who started the fight, Jefferson admitted "I did." *Id.*

incompatible with the commands of the Eighth and Fourteenth Amendments." *Penry*, 492 U.S. at 328.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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